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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE CONSUELO B. MARSHALL, JUDGE PRESIDING

UNITED STATES OF AMERICA,)
)
)
)
Plaintiff;)
) No. CR06-391
VS)
)
)
STEVEN ERIK PROWLER)
)
)
Defendant.)
_____)

Reporter's Transcript of Proceedings
HEARING
Los Angeles, California
TUESDAY, OCTOBER 20, 2009

Anne Kielwasser, RPR No. 50901
Federal Official Court Reporter
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1 TUESDAY, OCTOBER 20, 2009

10:30 A.M.

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3 P R O C E E D I N G S

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5 COURT CLERK: Item No. 2. CR-06-391. United
6 States of America versus Stephen Prowler.

7 Appearances, please.

8 MS. GARNETT: Good morning, Your Honor. Sherilyn
9 Garnett, Assistant United States Attorney. Also with me at
10 the counsel table is Special Agent Derek Chen.

11 THE COURT: Good morning.

12 MR. DYBWAD: Good morning, Your Honor. Chris
13 Dybwad on behalf of Mr. Prowler. Mr. Prowler is present via
14 in VideoLink, but he's in custody in Seagoville, Texas.

15 THE COURT: Good morning, Mr. Prowler.

16 THE DEFENDANT: Good morning, Your Honor.

17 THE COURT: Sir, if at any time you're not able to
18 hear us as we speak, please let us know that in some way, by
19 raising your hand or something of that type, and that will
20 indicate to me that you are not hearing the proceedings, and
21 we'll try to do whatever we can do to make sure that you're
22 able to hear; and of course we need to hear you as well when
23 you address the Court; and so, if we're not able to hear you,
24 we'll also indicate.

25 The matter is here for sentencing this

1 morning, and I know that Mr. Levario has communicated with
2 counsel that I am not going to be imposing sentence today. I
3 know this case has a long history, but I'm new to the case.

4 When I started my review of documents that I
5 need to review in order to make a determination as to what
6 went wrong with the last sentencing, and I'm not clear on
7 that, so I'm going to ask you some questions about it. I've
8 looked at the mandate from the Circuit; but as you know, it's
9 just a one-page mandate. I came to some conclusions from
10 reading it but still not sure if it's the right conclusion.

11 I'm aware that counsel were not in agreement
12 as to the calculation of the Guidelines. I've looked at a
13 chart that I think was prepared by the defense counsel trying
14 to give the Court some guidance as to where you disagree.

15 So, I need to do the research to satisfy
16 myself as to whether either of you arrive in your
17 calculations, so I can make the findings for the record.

18 It would be helpful to the Court if I had a
19 copy of the transcript from the last sentencing proceeding
20 that was not a part of the file that might have helped me
21 understand what the issues were and where I needed to focus
22 my attention in order to resolve them.

23 I do not have the former position papers,
24 apparently, that you've filed for the previous sentencing.
25 Mr. Levario tells me that he can provide to me the

1 government's position papers. Apparently that's something
2 that he can obtain. But the defense's position papers
3 apparently was filed under seal, but I would have expected
4 the government's would be under seal as well.

5 So I don't know why one seems to be
6 available, one isn't; but I know that these issues are all
7 going to be resolved. I put this on the record just to
8 explain to you and to explain to the defendant why I am
9 unable to actually impose sentence today.

10 I understand that both sides have agreed that
11 the sentencing may proceed with the defendant remaining at
12 the facility where he presently is located; but participating
13 by way of video, this is the first time I've actually had a
14 criminal proceeding by way of video.

15 One of the questions that I have, though, is:
16 How does defense counsel communicate with the defendant?
17 Since you're here, and the defendant, as I understand, is in
18 another state.

19 I can envision that there may come a time
20 when the defendant may want to consult with defense counsel
21 or defense counsel may want to give some advice to the
22 defendant based upon questions that the Court might ask or
23 other things that could happen in the sentencing hearing; and
24 so, I don't know how you would communicate and still keep
25 that in confidence.

1 It would appear to me that the defense
2 counsel should be at the same place where the defendant is
3 located to be able to communicate. So, I don't know how you
4 thought that could be accomplished, but I'm sure that's
5 something you're going to explain to me.

6 The other questions that I have, I noticed
7 that the conditions of supervised release, quite a long list
8 of them, and there may be case law that addressed some of
9 these conditions since this sentence was imposed. I don't
10 know that for sure, but I would ask that counsel review all
11 of the conditions to see whether or not there is any
12 objection to any of them, and if they are supported by case
13 law.

14 There are new cases that come down, you know,
15 all the time from the Ninth Circuit that give us all guidance
16 as to whether a condition is an appropriate one,
17 constitutional or too broad or, for instance, one of those
18 that I noticed is a condition I know that I have not imposed
19 because I don't know what it involves, and it's listed as
20 No. 9 in the report prepared of the confidential letter,
21 prepared by probation, it's the ABEL, A-B-E-L, Testing. I
22 have no idea what that is.

23 On prior occasions, I think I've called
24 probation to seek some guidance as to what it is and what's
25 involved, and I don't think it's a condition that I have

1 imposed in the past. So, that may be one that counsel need
2 to find out more about it if you feel that this is an
3 appropriate condition.

4 The ones that I question whether or not there
5 are any cases that would suggest that they need to be either
6 reworded or not imposed at all are numbers 4, 5, 6 and 7.
7 They all have to do with restricting computer use and search
8 of computers, and it may be that those are fine. I just
9 simply don't know what the current law is. The sentence was
10 imposed two years ago. So, things may have changed within
11 that two-year period.

12 So, those are the reasons why I don't feel
13 that I can impose sentence today. I just don't think I have
14 all the information that I need. So, maybe you can answer
15 some of the questions that I have raised.

16 First, Defense Counsel, are you satisfied
17 that it's fine for you to be here and the defendant to be in
18 a facility in Texas? And if there is a need for you to
19 communicate in a confidential way, how could that be
20 accomplished?

21 MR. DYBWAD: Your Honor, it was my understanding
22 from Mr. Prowler previously that he wanted to proceed by way
23 of VideoLink rather than being re-transported back to the
24 Metropolitan Detention Center. It is my current
25 understanding that that is the way he wants to proceed.

1 As to the Court's second question, that
2 actually occurred to me while walking into court this
3 morning, perhaps it may be possible to use one of the
4 telephone lines in the Court to contact the room that
5 Mr. Prowler is in, in Seagoville, Texas, should the need
6 arise for a private consultation.

7 As the Court has accurately identified, there
8 is no way to have a private conversation, giving counsel,
9 while Mr. Prowler is on the VideoLink, and I'm standing here.
10 That simply wouldn't be private. Perhaps it may be possible
11 to use the Court's courtroom deputy's phone and make sure
12 that there is an open phone line in the facility that
13 Mr. Prowler is at.

14 THE COURT: And I can ask the defendant some
15 questions, but I'll try to just ask those questions of
16 defense counsel rather than speaking directly to the
17 defendant and having to try to figure out how you advise him
18 or communicate; but are you satisfied that proceeding by way
19 of video, the defendant is still going to receive adequate
20 representation of counsel?

21 MR. DYBWAD: I am, Your Honor. As the Court
22 noted, this case has a long procedural history. Mr. Prowler
23 and I have been acquainted for many years.

24 If Mr. Prowler believes that it's
25 inappropriate and says so on the record, then obviously I

1 believe an in-person resentencing is appropriate, but my
2 current understanding is that proceeding by way of VideoLink
3 is the preferred method.

4 THE COURT: And do you know if he has made the
5 decision to proceed in that way because there were
6 difficulties transporting him to the courthouse, or has he
7 made that decision just for some other reason?

8 MR. DYBWAD: Your Honor, it's my understanding
9 that in part the decision, it was made for two reasons: One
10 is, while the case is initially proceeding pretrial,
11 Mr. Prowler was housed in an administrative segregated way at
12 the MDC on 23-hour lockdown, essentially solitary
13 confinement; and it's my understanding that Mr. Prowler does
14 not have the desire to return to those conditions, and, in
15 fact, those are the conditions that Mr. Prowler would need to
16 be in if he were awaiting the resentencing at the
17 Metropolitan Detention Center.

18 It's also my understanding that if he were to
19 move from the Seagoville, Texas to the Metropolitan Detention
20 Center, he would lose his possessions. In short, he has
21 established a routine and a way of life at Seagoville, Texas
22 which he would lose if he was transported back here to be
23 physically present for the resentencing.

24 And certainly if I've phrased any of that
25 incorrectly, Mr. Prowler could correct me.

1 THE COURT: I'm not familiar with the facility at
2 Seagoville, Texas. I assume that's a Bureau of Prisons
3 facility.

4 MR. DYBWAD: It is, Your Honor. I believe it's
5 spelled Seagoville, S-E-A-G-O-V-I-L-L-E.

6 PROBATION OFFICER: That's correct, Your Honor.
7 It's a Bureau of Prisons facility, and it's a minimum
8 security institution.

9 THE COURT: And do either counsel know why the
10 Bureau of Prisons chose to place him there? Is there some
11 special program that they offer based upon the offense to
12 which he's pled or some other reason?

13 MR. DYBWAD: Your Honor, I can offer this: I have
14 had other clients with this type of offense or offenses that
15 fall within this ambit, and a number of them are at
16 Seagoville, Texas. It leads me to believe that it is a
17 facility that houses in part these types of offenses.

18 THE COURT: Do either of you know the city to
19 which one would fly in for purposes of visiting this
20 facility? Because I'm not familiar with it, so I would want
21 more information about what program they have.

22 I don't have control over where he serves his
23 sentence, but I can make the recommendations; and for a
24 while, I was under the impression that Butner in North
25 Carolina had a specific program for those who were convicted

1 of similar offenses. Now, maybe this facility has a special
2 program too, or there could be some other reason for it.

3 But what city is it close to?

4 PROBATION OFFICER: Dallas, Your Honor. Dallas,
5 Texas.

6 MR. DYBWAD: And, Your Honor, it's been my
7 experience in my office that offenders who might have used to
8 be at Butner, while some were still sent to Butner,
9 Seagoville also has some of them.

10 THE COURT: All right, so, it may be a special
11 program there that I'm just not aware of, and it's a good
12 time for me to become educated about what that program might
13 be.

14 Let me just ask the defendant a few
15 questions. Mr. Prowler, is it your desire to proceed at your
16 sentencing hearing by way of a video? You remaining at the
17 facility in Texas, and the rest of us being here in Los
18 Angeles in the courtroom?

19 THE DEFENDANT: Your Honor, yes, it is. It's a
20 difficult decision for me. I always believe in personal
21 face-to-face contacts; but in this case, considering what
22 I've been through presentencing, and all the factors
23 involved, I don't want to do that again, and the transport
24 and stress. I thought that this would be good.

25 But the only thing I'm insisting on is that I

1 have adequate chance to converse confidentially with my
2 public defender via telephone just for a short time.

3 I had some trouble reaching him earlier in
4 the week. He's out a lot, but if I could be assured that I
5 can just chat with him by a phone, at some point in the
6 future, that would be fine. I do consent to this video.

7 MR. DYBWAD: And, Your Honor, as I understand the
8 Court's comments this morning, we won't be proceeding with
9 the resentencing today but rather we're simply taking the
10 steps to ensure that when we do return for a resentencing,
11 every mechanism is in place. And I think it is important
12 that one mechanism be a telephone line in the courtroom as
13 well as the telephone on the other end in Seagoville.

14 THE COURT: Well, I'll charge you with the
15 responsibility of making sure whatever is needed that would
16 permit you to communicate with Mr. Prowler confidentially,
17 that those arrangements be made; and so, I'm not quite sure
18 what needs to be done on his end, what needs to be done here;
19 but you will have the responsibility for making sure that he
20 gets adequate representation if we proceed in this manner.
21 And I understand that it's his desire to proceed this way as
22 long as there is a method of his communicating with counsel
23 confidentially.

24 You might also discuss with him if there is
25 anything that he wishes the Court to consider in addition to

1 the things that are going to be provided by both government's
2 counsel and defense counsel, that those be available to the
3 Court.

4 Sometimes defendants have letters that
5 they've written themselves, or they have some certificates
6 that they've received that says they've been in custody that
7 would show what they've been doing since they've been there,
8 information that might be provided by the warden or others
9 who are in charge of that facility about programs that he's
10 participating in and what they see as far as a successful
11 participation in those programs.

12 There may be others in the community that he
13 wishes the Court to hear from either by written
14 correspondence or otherwise. So, I want to make sure that by
15 proceeding this way, we don't have the defendant at some
16 later time petitioning the Court and expressing some concern
17 about ineffective assistance of counsel or things that
18 weren't in accordance with the way he wanted them to be at
19 the sentencing hearing because we have time to make sure that
20 those things are taken care of.

21 One of the questions I wanted to raise with
22 the government, the Court is aware that victims have a right
23 to attend these proceedings and be heard at the sentencing
24 hearing. I understand from what I have read or believe that
25 the victims in this case are in another country, in Thailand,

1 and at least at the time that the offenses occurred, they
2 were young men; but I don't know what the government has done
3 to make sure that they are aware of their rights, as the
4 Court is required to make sure that they be given that
5 opportunity to be heard if they are present.

6 So, the government might want to address
7 that.

8 MS. GARNETT: One moment, Your Honor.

9 MR. DYBWAD: And, Your Honor, at a later point I
10 can speak to the procedural history and my understanding of
11 the parties' positions and why it is back on remand. I
12 understand that someone had --

13 THE COURT: I'm going to ask that question.

14 MS. GARNETT: Your Honor, as to the victims in
15 this case, one of the issues that we've had all along is
16 because of the nature of the victims being homeless children,
17 we have lost track of them at various times.

18 For example, one of the victims, Jack,
19 immediately after the offense that's charged in Count No. 4,
20 disappeared, so that defendant could not be charged in
21 Thailand with molesting him.

22 We had the same problem when we brought the
23 case here. We have tracked down the victims at various
24 times, but they had run away or disappeared, and that has
25 been the problem throughout this case.

1 So, we can do our best to track them down
2 again, but many of the victims that we had had disappeared,
3 and so can we can't notify them.

4 THE COURT: And I'm not asking that government's
5 counsel or the agent do any extra work. I just want to make
6 sure that the record is clear that the Court is complying
7 with the statute that requires that victims be given an
8 opportunity to be heard at all phases of the proceeding, and
9 of course that does include the sentencing hearing.

10 I assume, based on government's counsel's
11 comments, that there are also not guardians who may have some
12 interest in these proceedings and may want to have a voice?

13 MS. GARNETT: At the time that the matter was
14 going to trial, we tried to get guardians to, for the
15 children that we could find, and the case agents here and in
16 Thailand were going to serve as those guardians and sort of
17 chaperone them through the judicial process; but since then,
18 since it's gone on appeal, that has fallen by the wayside.
19 So, we do not have guardians; and if they were guardians,
20 that would be the case agent that's here, as well as another
21 person.

22 As far as being aware of the process, at the
23 time that the agents were able to track down some of the
24 victims, they did speak with the victims and get their
25 positions in terms of how they had dealt with the defendant

1 and things that he could have done instead of the conduct
2 that he engaged in with them, and those are referenced in the
3 Declaration of Gary Keirnan that was filed under seal.

4 And I want to make sure that the Court, at
5 some point before we leave here, has or is aware of all the
6 various papers that the government filed. They were all
7 under seal, but we filed a sentencing position as well as the
8 declaration that includes multiple exhibits from A to U.

9 THE COURT: So, what I'll do is, I'll order for
10 both counsel to meet-and-confer with the courtroom clerk,
11 Mr. Levario, when we finish this proceeding.

12 You can identify for him everything that I
13 need to read in order to clearly understand your respective
14 positions and then make sure that all of those things are
15 available to the Court.

16 As I said, I have not read any of those
17 things, so I think you can better understand and the
18 defendant can understand, too, why I can't proceed with the
19 sentencing hearing. I just don't have the knowledge that I
20 need to have in order to make the record and impose the
21 sentence.

22 The Court, then, assumes that, as the case
23 was being prepared for trial that the victims -- no
24 arrangements were made for the victims to be present to offer
25 testimony?

1 MS. GARNETT: Arrangements were made, Your Honor.
2 We went through the INLAP process, and, actually, the victims
3 that we could find, we made arrangements to have somebody
4 watch over them and have them transported here to the United
5 States and be watched over while they were here in the United
6 States. That all took place through the Thai embassy.

7 It's just that after the defendant pled
8 guilty and we were proceeding to sentencing, we lost track of
9 some of the victims; and, you know, I cannot make any
10 representations as to where any of these victims are today.

11 THE COURT: Okay, and it may be contained in the
12 declarations that I haven't read. So, the agents may have
13 advised the victims that even though the defendant pled, that
14 it wasn't necessary for them to be present to testify at
15 trial. They still had a right to make a statement at the
16 sentencing hearing if they so desire, and this may have all
17 been done, and it may be addressed in all the filings that
18 have been made. I just don't know.

19 MS. GARNETT: Well, it hasn't been addressed, Your
20 Honor.

21 THE COURT: Okay. So, counsel, take a look at the
22 statute and satisfy yourselves. If there is something more
23 that needs to be done in order to make sure that the Court is
24 complying with the statute that does give victims that right,
25 that we've done everything that we're supposed to do in order

1 to make them aware that they have a right to be heard at the
2 sentencing hearing.

3 I did want to go next to the question of why
4 the remand, and I'll tell you what I'm reading into the
5 mandate, but I could be wrong; and if so, you'll straighten
6 me out.

7 It appears that while probation calculated
8 the guideline sentence and actually addressed the guidelines
9 in the presentence report, identifying all the factors that
10 need to be identified for purposes of that calculation, that
11 the government agreed with probation's calculations, that is
12 the guidelines range, and how probation arrived at that
13 range, but the defense disagreed; that at the sentencing
14 hearing, apparently, the sentencing judge never indicated how
15 the judge calculated the guideline range for purposes then of
16 imposing the sentence considering all the factors that need
17 to be considered for that purpose.

18 That's what I assumed happened from reading
19 the mandates. The mandates suggests that there was no way to
20 determine the sentencing judge's calculation of the guideline
21 range.

22 So, that's what I understand may have
23 occurred, but you'll straighten me out.

24 MR. DYBWAD: Your Honor, I believe that's
25 essentially correct. The probation and the government

1 calculated the guideline range. I believe the total offense
2 level is 39.

3 At the time of sentencing -- and the defense
4 disputed the number of the enhancements as calculate by the
5 probation and the government. At the time of sentencing, as
6 the sentencing judge pronounced a ten-year sentence and
7 pronounced that the total offense level was 30 but did not
8 explicitly articulate what guideline calculations had gotten
9 to that point.

10 The government subsequently appealed the
11 sentence and identified two provisions that they believe that
12 the judge had either rejected or not adequately taken into
13 account, that specifically the vulnerable victim enhancement
14 which the government believes was not applied at the original
15 sentencing as well as the double counting argument as to the
16 five-level for the pattern of activity, and essentially
17 resurrecting the dismissed counts under the multiple-count
18 grouping rule.

19 And the government has advanced that to the
20 Ninth Circuit, but the district court had improperly rejected
21 both of those. The defense position on appeal was, in this
22 case, it actually was not possible to tell how the district
23 court had calculated the total offense level at 30. There
24 were certain permutations that could have applied that were
25 not applied, and therefore it was impossible to tell what was

1 or wasn't included.

2 The Ninth Circuit in remanding issued an
3 unpublished disposition which said -- well, it actually said
4 that the parties agreed that there was no way to tell how
5 total offense level of 30 came about, and it needs to be
6 vacated and remanded for a resentencing.

7 In short, what I think what I've offered the
8 Court is that the Ninth Circuit did not opine on what
9 enhancements apply and don't apply. It simply said that it
10 was unclear at the original sentencing.

11 THE COURT: And that's the Court's understanding,
12 and so that's why this would be a new sentencing with the
13 parties addressing the appropriate guidelines, providing the
14 Court with your support, which I assume is in your original
15 position paper; and if that's the case, I don't need new
16 position papers, unless the law is changed in some way.

17 And then the Court would then, as I always
18 do, make a finding as to the appropriate guideline range
19 indicating how I arrived at that figure, what the guideline
20 range is based upon the Court's offense level and the
21 criminal history, and then I go through all the other factors
22 that we need to consider for sentencing purposes.

23 I want to ask one question. The mandate
24 seems to suggest that the parties agreed that the case had to
25 be remanded. Am I correct? That the parties agreed that

1 this is a case that had to be remanded in order for the
2 defendant to be sentenced properly.

3 MR. DYBWAD: Your Honor, I did not author the
4 brief for Mr. Prowler. Certainly it was the defense's
5 position that because it was unclear, it necessitated a
6 remand. As to the government's position re a remand, I
7 think, presuming they were correct, they were, nonetheless,
8 need to be remanded.

9 MS. GARNETT: The government's position was the
10 same. It necessitated a remand not just for the calculations
11 of the guidelines, but we also argued in our position paper
12 that the sentencing judge had relied on certain reasoning for
13 the ultimate sentence that wasn't in keeping with the facts
14 of the case, and that was all a part of our argument.

15 And I just also want to point out to the
16 Court that this appeal took place in the midst of, Gall the
17 Supreme Court's decision in Gall and what the correct steps
18 should be taken for reviewing sentences of this nature. And
19 our position, and what the Ninth Circuit has made clear in
20 ^ Carny (phonetically spelled) or ^ Cargy (phonetically
21 spelled), in 2008, is that you start first with calculating
22 the guidelines and then you move on to a reasonableness
23 determination.

24 Our position is the guidelines were not
25 calculated in a manner where we could determine whether they

1 were correct; and our position is they were not correct based
2 on the ultimate total offense level and so we didn't reach
3 the reasonableness issue.

4 And so when we remanded the case or when the
5 case was remanded, it's for a proper calculation as well as
6 the discussion of the 3553(a) factors.

7 MR. DYBWAD: And, Your Honor, I believe that
8 comment becomes a little bit more complicated. The
9 government as, Ms. Garnett just pointed out, the government
10 appeals on the guideline calculation. They did not appeal on
11 the reasonableness grounds. As I understand, the
12 government's Reply brief in front of the Ninth Circuit they
13 essentially dropped a footnote saying, Well, we didn't
14 address reasonableness because under Cargy (phonetically
15 spelled) Ms. Garnett is absolutely right, the first set is to
16 accurately calculate the guidelines.

17 In the Ninth Circuit the defense included a
18 press release that the government issued at the time of the
19 original sentencing saying that this was a decade-long
20 sentence, there was a harsh sentence, that it was a strong
21 deterrent.

22 Actually, the Court made one comment, I would
23 want to clarify. Those parties have, in fact, put in
24 supplemental position papers before this resentencing,
25 certainly those are papers that the Court should have as

1 well, and we'll make sure that the Court gets those.

2 THE COURT: Well, I will tell you what I have
3 seen. I do have the defendant's position re resentencing,
4 and the proof of service date is October 13, 2009.

5 And so that's where the Court saw this, what
6 I call the chart on page 3. It's entitled Parties' Positions
7 Re Advisory Guidelines. And what it does -- or at least I'm
8 interpreting it to mean that use of a minor, the government
9 agreed with probation that there were a two-point increase
10 for that, but the defense's position was: It does not apply.

11 "Vulnerable victim," again, four points. The
12 government and the probation department agree. The defense
13 says it does not apply.

14 On "multiple count adjustment," five points,
15 both probation and the government agree that that was
16 applicable, and the defense indicated it does not apply, and
17 then the pattern of activity, five points. Probation,
18 government agreeing; the defense, it does not apply if
19 multiple counts applies.

20 And so what this chart shows is that the
21 government in probation's calculation was 39. The defense's
22 calculation was 28. And now the parties advised me that the
23 judge found the offense level to be 30. Everybody, I think,
24 agreed it was the criminal history category of 1.

25 So, is the judge's sentence within the

1 guideline range of an offense level of 30 and a criminal
2 history category of 1, or was it still outside of that range?

3 MR. DYBWAD: Yes, it was, Your Honor.

4 THE COURT: It was inside the range?

5 MR. DYBWAD: It was inside the range at the
6 high-end. At offense level 30, criminal history category 1,
7 the advisory guideline range is 97 to 121. A sentence of 120
8 months was at the top end of that calculated guideline range.

9 THE COURT: Would it be helpful -- do the parties
10 think it would be helpful to the Court to have the briefs
11 that you filed with the Ninth Circuit? May be helpful, maybe
12 not. I just don't know. I haven't seen them. Is that
13 something that you think it would be helpful if the Court had
14 the benefit of those briefs, the cases that you cited in
15 those briefs, and for the Court to do its research and its
16 analysis?

17 MR. DYBWAD: I defer to the government. The
18 government did also file a supplemental paper where they
19 address, I believe, a lot of the same arguments, correct me
20 if I'm wrong, that are in the Ninth Circuit brief.

21 I'm sure to the extent the Court would be
22 helped by that, I'll be happy to provide the briefs to the
23 Court.

24 THE COURT: I just don't know if it's helpful.
25 You prepared those briefs or somebody in your offices did.

1 Would the government's counsel tell me what
2 was the filing date of the paper that you filed, position
3 paper that you filed for purposes of this hearing?

4 MS. GARNETT: October 13th. I filed it the same
5 day as defense counsel.

6 THE COURT: And was it filed under seal?

7 MS. GARNETT: No, Your Honor.

8 THE COURT: Okay, nor was the defense's filed
9 under seal.

10 MR. DYBWAD: The defense's was filed under seal.
11 The government's was not filed under seal.

12 THE COURT: All right, so, as I said, if you'll
13 talk to Mr. Levario before you leave, we just need to find
14 all these things and put them together.

15 Now, if you think it would be beneficial to
16 the Court to review the briefs that you filed on appeal, I'll
17 review them, but I'll let you make that initial decision.

18 It might be that you have put in your more
19 recent position papers, and there is no position papers,
20 everything that you think the Court needs to know, the new
21 cases that you may rely upon as well as anything that may
22 have changed since the defendant was sentenced two years ago.

23 So, I'm not looking for extra reading. I
24 just want to make sure that I have everything that I need to
25 do the job that I need to do.

1 Okay, those were the concerns that the Court
2 had. Are there other things that you wish to place on the
3 record, just so that the Court should consider it, at least,
4 before we have our new sentencing date?

5 Does government have anything more to put on
6 this record?

7 MS. GARNETT: No, Your Honor. I just want to
8 point out one thing. The defense counsel -- just because he
9 raised it today in court -- talked about a press release that
10 was attached to the defense counsel's papers; and obviously
11 the government is always going to be respectful of the
12 Court's decisions. The government is not going to attack the
13 Court's decisions in the media, but in this we and probation
14 has been very consistent about what we thought was the
15 reasonable and appropriate sentence from the very beginning
16 to the fact that we appealed the sentence to the Ninth
17 Circuit, and we're arguing the same thing today and at the
18 ultimate sentencing. And so, to point to a press release, I
19 think is just --

20 MR. DYBWAD: And, Your Honor, I respectfully
21 disagree; and we can get into the press release right now.

22 THE COURT: No, I don't think we need to. Let me
23 just advise the parties. As far as I'm concerned, this is a
24 resentencing, starting all over again.

25 I think it's my job to read the position

1 papers of the parties, the presentence report, to calculate
2 the guidelines based upon the information that each side has
3 provided, including probation; and I agreed the starting
4 place, and it's always the place where I start is the
5 guideline calculation.

6 If I agree with it, then I would say so; if I
7 disagree with it, I would say so; but then I would make
8 specific findings on the arguments that the parties have
9 made. So it would be clear from the record for you, for the
10 defendant and anybody reviewing the record that the Court has
11 calculated the guidelines in this particular way and then
12 what the sentence is within that guideline range, and then
13 the Court would go through all of the other factors that the
14 Court needs to consider for a sentencing purposes.

15 So, the press release, I doubt that it would
16 be helpful to the Court anyway; but, you know, it doesn't
17 preclude you from providing the Court with whatever you think
18 the Court needs, and then both sides, of course, can
19 certainly object to anything that's provided that you think
20 is not relevant, and the Court would be able to rule on that.

21 So, I don't think that we need to make those
22 findings here. I start with the premise of knowing very
23 little about the case, just the few things that I was able to
24 find, the presentence report, but I didn't have the benefit
25 of the position papers of the parties.

1 So, that's where we are.

2 MR. DYBWAD: And, Your Honor, I understand the
3 Court's comments, and I'm not going to argue now. I do think
4 it's relevant; and at the time of sentencing, I can explain
5 why.

6 THE COURT: Okay, all right. Anything else that
7 either side -- any questions that you wish to ask me just so
8 that we can all be prepared for this hearing when we set it
9 next or just anything else that you wish to place on the
10 record?

11 Government have anything?

12 MS. GARNETT: One moment, Your Honor.

13 (Discussion off the record.)

14 MS. GARNETT: No, Your Honor.

15 THE COURT: Defense, anything?

16 MR. DYBWAD: Your Honor, the only thing I'd note
17 is that, given the Court's comments about some of the
18 supervised release conditions, after taking a look, there may
19 be an additional defense filing regarding those and also
20 given the Court's comments about making sure that any
21 information about Mr. Prowler's progress while in custody is
22 before the Court, that may also be attached to an additional
23 filing. I just want to alert the Court that that is a
24 possibility.

25 THE COURT: Why don't I just order that if either

1 side decides to supplement the position papers that are
2 presently before the Court, and that includes your most
3 recent ones, that those additional filings to be filed with
4 the Court no later than two weeks prior to the sentencing
5 hearing.

6 I said two weeks because then that gives each
7 of you an opportunity to object to anything that the other
8 may have filed or to be able to advise the Court as to why
9 you think it's not correct or misleading or whatever your
10 position might be.

11 Then I think we remain then to find a new
12 date for a sentencing; and Mr. Levario and I did talk about a
13 date. I don't know if it works, but I'll let him tell us.

14 COURT CLERK: Your Honor, we have a couple of
15 dates that may be available: November 23rd or the 30th.

16 THE COURT: So, November 23rd is probably a better
17 date than the 30th, correct?

18 COURT CLERK: Correct.

19 THE COURT: Just in terms of things we have on
20 calendar.

21 So, I'll tell you why there are two suggested
22 dates. I will be starting a trial on the 3rd of November.
23 Based upon the time estimate, I believe that we should be
24 finished by November 3rd, but you know how that goes. So,
25 I'm usually wrong on the estimates. I'm always thinking

1 we're going to finish sooner than we do.

2 So, we could give you the 23rd. If for some
3 reason it appears to the Court that we are not going to be
4 finished with the trial and therefore able to sentence in
5 this case on the 23rd, I will know that ahead of the 23rd.
6 So, Mr. Levario could just simply give you that information.

7 The other date, the 30th, Mr. Levario
8 indicated to me that's a very heavy calendar date; and so,
9 this sentencing will take some time. So, I don't want to put
10 it on a day when we're all feeling that we are overwhelmed;
11 but if we set it for the 30th, it would be the afternoon of
12 the 30th. Both days are Mondays, I believe.

13 COURT CLERK: Correct, Your Honor.

14 THE COURT: So, it would be the afternoon of the
15 30th.

16 And do we have anything on calendar on the
17 afternoon of the 30th.

18 COURT CLERK: We do, but I understand there may be
19 a request to continue those matters.

20 THE COURT: So, I'm prepared to offer you the
21 23rd, indicating that if it appears that the Court is not
22 going to be available that date because we're still in trial,
23 we'll give you advanced notice and then would continue it
24 probably to the 30th, or we can set it for the 30th now.

25 So, either counsel have any preference for

1 either of those dates? They're both Mondays.

2 MS. GARNETT: November 23rd is fine with the
3 government counsel.

4 THE COURT: How about defense?

5 MR. DYBWAD: Your Honor, November 23rd is fine
6 with defense counsel as well. I have a sentencing at 9:00
7 a.m. that day as well as in the afternoon. Was the Court
8 contemplating an 11:00 o'clock as well?

9 THE COURT: I will ask Mr. Levario.

10 On the 23rd what would be the time?

11 COURT CLERK: 1:00 o'clock.

12 THE COURT: 1:00 o'clock on the 23rd would be the
13 time.

14 And what's our time difference between here
15 and the community in which the defendant is? Is it two
16 hours?

17 MS. GARNETT: I believe it's three hours, isn't
18 it?

19 THE COURT: And of course we're going to change
20 time soon, so it may differ.

21 The only reason I raise that question -- if
22 we set it for the afternoon, I don't know what's going on at
23 the facility in the afternoon. This is something defense
24 counsel could find out, whether based upon the difference in
25 time, it would affect any programs, meals, anything else that

1 may be occurring in the institution; but I'll leave you to
2 assist the Court in making that determination.

3 So, if you feel that is not a good time, just
4 based upon the difference in time, then we could change that
5 time, but then we would have to look at what you're doing as
6 well. So, I'll let you just work with Mr. Levario. Right
7 now, November 23rd at 1:00 o'clock.

8 If I could just ask the defendant: Sir, do
9 you know the time difference between California and Texas,
10 the time that we're talking about, in November?

11 THE DEFENDANT: Yes, Your Honor. It's two hours.
12 We are two hours ahead of you. So, noontime -- what is
13 noontime in Los Angeles it's 2:00 o'clock here.

14 THE COURT: So, if we set the sentencing hearing
15 to commence at 3:00 o'clock, I'm sorry, at 1:00 o'clock our
16 time, which will be 3:00 o'clock your time, and if it took
17 approximately an hour to do that, is there anything going on,
18 of which you're aware at the institution that would conflict
19 with that schedule?

20 THE DEFENDANT: To the best of my knowledge, there
21 is no conflict. My case manager is with me right now, and he
22 indicated that there would be no problem.

23 THE COURT: Okay. All right, so, the matter is
24 continued to November 23rd at 1:00 o'clock; and then if any
25 additional supplemental filing is to be filed, no later than

1 two weeks prior to that date.

2 Anything else that we need to put on the
3 record?

4 MR. DYBWAD: Your Honor, and I'm sure this has
5 been done. I know the Court issued a writ, and I just wanted
6 to make clear that the writ was cancelled and that there is
7 no accidental transporting of Mr. Prowler.

8 MS. GARNETT: I informed the marshal person who
9 handles transportation that I would give her a call after
10 this hearing to let her know whether we would need the writ,
11 and I can tell her that we've made arrangements for video
12 conferencing.

13 THE COURT: All right, so, that's only contingent
14 on defense counsel satisfying yourself that there will be a
15 way to communicate in confidence with your client to satisfy
16 the requirements of affective assistance; and if there is any
17 problem and a decision is made, that defendant needs to be
18 transported here, then that information should be provided to
19 those who would be responsible for getting those arrangements
20 made.

21 So, if we need another writ or the marshals
22 need to know, at this point it appears that it is
23 Mr. Prowler's position that he'd like to remain at the
24 facility, have the sentencing hearing by video as long as he
25 can be assured that there is a way to communicate with

1 counsel in confidence.

2 That is your position, Mr. Prowler?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: All right, thank you.

5 MR. DYBWAD: Thank you, Your Honor.

6 THE COURT: Okay, thank you.

7 ~ ~ ~

8 (Proceedings concluded.)

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C E R T I F I C A T E

I hereby certify that the foregoing is a true and correct transcript of the stenographically recorded proceedings in the above matter.

Fees charged for this transcript, less any circuit fee reduction and/or deposit, are in conformance with the regulations of the judicial conference of the united states.

9/10/2010

Anne Kielwasser, CSR, RPR
Official Court Reporter

Date

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